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**IN THE
COURT OF APPEALS OF INDIANA**

REGINALD DURR,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0610-CR-551

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0604-FB-72103

June 11, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Reginald Durr (Durr), appeals his sentence for Count II, Parts I and II, carrying a handgun without a license, a Class A misdemeanor and a Class C felony, respectively, Ind. Code § 35-47-2-1.

We affirm.

ISSUE

Durr raises one issue on appeal, which we restate as: Whether the trial court appropriately sentenced Durr.

FACTS AND PROCEDURAL HISTORY

On April 24, 2006, the State filed an Information charging Durr with Count I, unlawful possession of a firearm by a serious violent felon, a Class B felony, I.C. § 35-47-4-5; Count II, Part I, carrying a handgun without a license, a Class A Misdemeanor, I.C. § 35-47-2-1; and Count II, Part II, carrying a handgun without a license, a Class C felony, I.C. § 35-47-2-1. Part II of Count II reads, in pertinent part, as follows:

[Durr], on or about April 22, 2006, having previously been convicted of a felony within the last 15 years, to wit: [r]obbery, a [C]lass C felony,¹ on February 28, 2001 . . . did, in a place not his dwelling, property, or fixed place of business, carry a handgun on or about his person or in his vehicle without a license

(Appellant's App. p. 18). July 3, 2006, pursuant to a plea agreement, Durr pled guilty to Count II, Parts I and II, in exchange for capping the executed portion of his sentence at two years. On July 21, 2006, the trial court, accepting the terms of the plea agreement,

¹ Although the charging Information states Durr was convicted of Class C felony Robbery, the Pre-Sentence Investigation Report indicates that while Durr was charged with robbery, he was, in fact, convicted of a lesser-included offense, Class D felony theft.

imposed a five-year sentence at the Department of Correction, with two years executed, three years suspended, and one year on probation. The trial court found Durr's "history of criminal [and] delinquent activity" consisting of juvenile true findings for theft in June 1997, burglary in November 1997, and battery in June 1998, a guilty verdict for Class D felony theft in February 2001, and operating a vehicle never receiving a license, a Class C misdemeanor, in December 2001, to be an aggravating factor. (Transcript p. 26). As mitigating factors the trial court found that Durr "accepted responsibility and avoided the cost and necessity of trial." (Tr. p. 26). However, the trial court found Durr's criminal history outweighed the mitigating factors due in large part to the fact that "by age twenty-four, [Durr] racked up a fair amount of [convictions]." (Tr. p. 27).

Durr now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Durr claims he was improperly sentenced. Specifically, Durr argues the trial court not only overlooked his mental health issues as a mitigating factor, but also used his mental health as justification for enhancing his sentence. As a result, Durr contends the trial court erred when it enhanced his sentence.

Durr was sentenced under Indiana's new advisory sentencing scheme, which went into effect April 25, 2005. Under this scheme, "Indiana's appellate courts can no longer *reverse* a sentence because the trial court abused its discretion by improperly finding and weighing aggravating and mitigating circumstances[;]" appellate review of sentences in Indiana is now limited to Appellate Rule 7(B). *McMahon v. State*, 856 N.E.2d 743, 748-49 (Ind. Ct. App. 2006) (emphasis added). Thus, the burden is on the defendant to

persuade this court that his or her sentence is inappropriate. *Id.* at 749. Nonetheless, an assessment of aggravating and mitigating circumstances is still relevant to our review for appropriateness under the rule, which states: “The [c]ourt may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Id.* at 748-49.

Durr’s criminal history was the only aggravator recognized by the trial court. I.C. § 35-47-2-23(c)(2)(B) states, “A person who violates section 1 of this chapter commits a Class A misdemeanor. However, the offense is a Class C felony if the person has been convicted of a felony within fifteen (15) years before the date of the offense.” Our review of the record indicates that Durr was convicted of a felony within the past fifteen years – theft in 2001. Thus, he was correctly charged with carrying a handgun without a license as a Class C felony. However, a fact that comprises a material element of the offense may not also constitute an aggravating circumstance to support an enhanced sentence. *Davis v. State*, 851 N.E.2d 1264, 1267 (Ind. Ct. App. 2006) (citing *Stone v. State*, 727 N.E.2d 33, 37 (Ind. Ct. App. 2000)). Therefore, Durr’s theft conviction may not also be used as support to enhance his sentence. While we recognize that under the new advisory sentencing scheme a trial court need not find any aggravating circumstances to enhance a sentence, we find that the trial court’s sentence appropriate with respect to Durr’s character. *See* I.C. § 35-38-1-7.1(d); *see also Fuller v. State*, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), *trans. denied*.

The record indicates Durr was twenty-four years old at the time of the instant offense. As a juvenile, beginning at age fourteen, Durr committed what would have been two felonies and one Class A misdemeanor were he an adult. Then, in 2000, he was waived to adult court and found guilty of Class D felony theft. Less than a year later he was charged and convicted of operating a vehicle never receiving a license, a Class C misdemeanor. Now, at the age of twenty-four, he is carrying a handgun without a license. We find Durr's character supports the five-year sentence imposed by the trial court.

CONCLUSION

Based on the foregoing, we find the sentence imposed by the trial court is appropriate.

Affirmed.

NAJAM, J., and BARNES, J., concur.